No. 95-593

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GERALD E. PICKERING, et al.,

Cross-Petitioners,

v.

UNISYS CORPORATION,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR CROSS-PETITIONERS

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REPLY BRIEF FOR CROSS-PETITIONERS

1. This case presents the question whether employees' reasonable expectations of secure medical benefits during retirement, based upon express promises of lifetime coverage in summary plan descriptions and systematic company statements confirming these promises, can be defeated by obscure clauses and by putative evidence of a contrary company intent which was never disclosed to employees.

The court of appeals determined that Petitioner Unisys Corporation breached its strict fiduciary duties under ERISA by systematically misleading and inducing employees to believe that their retiree medical coverage was secure. That ruling rests on fundamental fiduciary standards and an undisputed factual record of company conduct in violation of these strict standards.

The ruling on fiduciary breach accordingly does not warrant review by the Court. However, should the Court grant review, then the court of appeals' alternative rulings on contract and estoppel claims should also be reviewed. This will enable the Court to define comprehensively, through the vehicle of this case, the proper application of each theory of ERISA liability. If any review is warranted, coherence and clarity of precedent would be promoted by review of all rulings by the court of appeals.

2. The cross-petition does not ask the Court to review findings of fact. Cross-petitioner retirees do contend, however, that the court of appeals applied incorrect legal standards to evaluate the findings. Under the adverse rulings below, the protective purposes of ERISA – security of retirement benefits and clear, intelligible disclosures to lay employees – have been defeated on the basis of an obscure

reservation provision in a misleading summary plan description and evidence of secret, undisclosed employer intentions.

The Court emphasized in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-13 (1989), that contract-type claims for benefits under ERISA plans should be reviewed like "any other contract claim – by looking to the terms of the plan and other manifestations of the parties' intent." In this case, the terms of the plan were memorialized in summary plan descriptions which expressly promised that retiree medical benefits were provided for life. Similarly, the company repeatedly and systematically represented to employees that the benefits were provided for life. The record also showed that the company never informed employees that the promise of lifetime benefits could be defeated by operation of the reservation of rights clause.

The evidence relied upon by the lower courts to conclude that there was no intention to provide lifetime benefits deserves little, if any, weight. The lower courts relied upon the use of the word "vested" in a secret health plan for top-level executives, as well as the absence of a formal corporate writing or board resolution memorializing the policy of lifetime benefits which was repeatedly communicated to employees. App. 149a-50a. This evidence was unknowable by the employees and cannot be characterized as a manifestation of the company's intent. *See Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913) (practical interpretation of contract by parties through course of performance has great, if not controlling, weight); *Restatement (Second) of Contracts*, §§ 20(2), 200 cmt. b, 201(2), 202(5), 203 (1979).

Judicial reliance upon this evidence as a *secret* manifestation of intent also contravenes ERISA's purposes and its mandate that benefits disclosures be "written in a manner calculated to be understood by the average plan participant" and "reasonably apprise" employees about their rights, 29 U.S.C. § 1022(a)(1). The statute rejects the use of secret knowledge to defeat reasonable expectations about benefits, particularly when these expectations are based upon and reinforced by the employer's own conduct and statements.

For these reasons, granting the cross-petition would enable the Court to instruct lower courts that in evaluating evidence of intent, special weight must be given to an employer's manifestations of intent *to employees*, and that such evidence cannot be overcome by evidence of employer beliefs and conduct which are not disclosed to employees.

3. The lower courts have adopted conflicting approaches to evaluate evidence of company intent. In *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1428 (1995), plan SPDs stated that medical benefits would be provided until the death of the retiree, but the plan document stated that the company had the "right and power to alter, amend or annul" the medical plan. *Id.* at 948, 949. Although Unisys attempts to distinguish the case by noting that the plan stated that amendments would not apply to persons who already were receiving pensions, Unisys ignores that the case concerned a termination of a medical plan, not just an amendment. *Id.* at 949 (new Plan 1018 invalidated). Indeed, the court did not discuss the language invoked by Unisys. The court concluded that the extrinsic evidence of company statements and conduct consistent with lifetime benefits overcame the seemingly inconsistent reservation of

rights provision.[1] Although the employer presented little extrinsic evidence to support its position, *id.* at 950, the court's analysis in *Jensen*, which emphasized the manifestations of intent to employees, conflicts with the approach followed by the courts below in this case, which gave decisive weight to evidence of facts which were not disclosed to the employees.

4. The decision below also conflicts with decisions of other courts of appeal, by rejecting the retirees' estoppel claim on the ground that reliance on Unisys' promises of lifetime benefits was not "reasonable". The court of appeals ruled that the adverse construction of the reservation of rights provisions, formulated after two years of litigation, as a matter of law foreclosed the claim that the employees had reasonably relied on the company's systematic, repeated misstatements that the plans provided secure lifetime benefits. App. 154a-55a.

Unisys incorrectly argues that the decison below does not conflict with *Armistead v. Vernitron Corp.*, 944 F. 2d 1287 (6th Cir. 1991), because the plan in *Armistead* did not contain an effective reservation of rights clause. In fact, the Sixth Circuit in *Armistead* assumed for purposes of deciding the estoppel claim that the reservation provision *was* present and would have barred a claim for benefits under the plan, *id.* at

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[1] The decision in *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F. 2d 1384 (8th Cir. 1992), is not to the contrary. In that case, the participants did not dispute that the plan was clear and unambiguous on its face. *Id.* at 1386.

1299-1300, but nevertheless affirmed a ruling for the retirees on the estoppel claim, *id.* at 1290, 1305.[2]

The court of appeals' estoppel ruling in this case also contravenes the protective purposes of ERISA. Under the ruling, an employer can publish SPDs expressly promising lifetime benefits and reinforce this understanding among employees by additional statements and conduct, but then avoid these benefits obligations if it can establish in litigation that, despite its actual manifestations of intent to employees, it had no "real" intent to provide lifetime benefits (the legal equivalent of fingers crossed behind the back).

The reasonableness of reliance on a statement encompasses such factors as the maker of the statement (here, the company and its designated managers and benefits representatives), the formality of the statement (here, official written explanations of benefits and oral presentations to employees by persons with apparent authority), and the frequency with which the statement is made (here, made repeatedly and systematically throughout all levels of the company). The court of appeals, by contrast, defined the reasonableness element in a manner which ignored these normal indicia of reliability and instead required that the promised benefit be available as a matter of contract right. The rationale of the doctrine of estoppel would be defeated if estoppel could be established only where a contract claim also would be established.

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[2] The decision in *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993), is consistent. The court in *Gordon* ruled that there was no reasonable and detrimental reliance in that case because the plaintiffs could not show that they took any detrimental action on the basis of the estopping statements. *Id.* at 137-38.

The different approaches taken by the courts on these issues create significant variation in the manner in which ERISA welfare benefits claims are decided. This Court accordingly should grant the cross-petition to address these questions if it grants the companion petition in No. 95-376.

CONCLUSION

If the Court grants Unisys' petition for a writ of certiorari, this cross-petition also should be granted.

Respectfully submitted,

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